

**THE "LOON SHENG";
ENG HONG TRADING CO. SDN. BHD. v.
THE "LOON SHENG" OWNERS & ORS.**

[O.C.J. (Gunn Chit Tuan J.) December 12, 14 & 15, 1978]
[Penang — Admiralty Suit No. 34 of 1978]

Shipping Law — Claim by agents for disbursements — Arrest of ship — Meaning of "beneficially owned as respects all shares therein" — Whether there was jurisdiction to arrest ship — Courts of Judicature Act, 1964, s. 24(b) — U.K. Administration of Justice Act, 1956, s. 3(4).

The plaintiffs in this case filed a writ of summons on November 27, 1978 for the sum of \$258,128.01 in respect of disbursements made by them as agents of the defendants. On the same day the plaintiffs applied for a warrant of arrest of the ship "LOON SHENG" which was lying in the Port of Penang. The plaintiffs claimed that the defendants were at the time when the cause of action arose, the owners of the said ship and were also at the date of the issue of the writ in this action the beneficial owners of the ship in respect of all the shares therein.

The defendants sought to set aside the writ for want of jurisdiction *in rem* under section 3(4) of the Administration of Justice Act 1956 of England. The said Act was applicable in Malaysia by virtue of section 24(b) of the Courts of Judicature Act, 1964.

Held: (1) the court could pierce the corporate veil and look behind the registered owner to determine the true beneficial ownership of the ship;

(2) the expression "beneficially owned as respects all the shares therein" indicates title, legal or equitable, and cannot by any means cover cases of possession and control, however full and complete without ownership;

(3) for the ship to be liable to arrest it must be the ship in connection with which the claim made in the action arose, if at the time when the action was brought it was the property of the defendant to the action, the defendant being the person who would be liable on the claim in an action *in personam* and who was either the owner or charterer of or in possession or control of the ship at the time when the cause of action arose;

(4) the plaintiffs were not entitled to invoke the admiralty jurisdiction of the High Court against the ship which was not beneficially owned at the date of the issue of the writ by Lord Steamship Co. S.A. who were liable *in personam* on this claim;

(5) in the absence of proof of *mala fides* or malicious negligence, the court would not give damages against the parties arresting the ship.

Cases referred to:-

- (1) *The "Permina 108"* [1977] 1 M.L.J. 49, 50.
- (2) *The "Aventicum"* [1978] 1 Lloyd's Law Reports 184.
- (3) *The "Pangkalan Susu/Permina 3001"* [1977] 2 M.L.J. 129, 130.
- (4) *The "Strathnaver"* (1875) 1 App. Cas. 58, 66.

ADMIRALTY SUIT.

Mahinder Singh Dulku for the applicants/defendants.

N.T. Vello (Wong Kin Fun with him) for the respondents/plaintiffs.

Cur. Adv. Vult.

Gunn Chit Tuan J.: Eng Hong Trading Co. Sdn. Bhd. (hereinafter referred to as "the plaintiffs") filed a writ of summons on November 27, 1978 in this Admiralty Suit *in Rem* No. 34/78 for the sum of \$258,128.01 in respect of disbursements made by them as agents for and on behalf of the owners of and other persons interested in the ship or vessel "Loon

A Sheng" (hereinafter referred to as "the defendants"). On the same day the plaintiffs also requested for a warrant of arrest to be executed by the Bailiff of the High Court for the arrest of the ship or vessel "Loon Sheng" which was lying in the Port of Penang.

B In an affidavit filed by Mr. Wong King Fun, a partner of Messrs. Wong-Chooi and Mohd. Nor, the solicitors for the plaintiffs, it was stated that the plaintiffs were ship agents in Penang and at the request of the defendants had acted as agents in respect of call at that port of the defendants' ships "Loon Sheng, Loon Mau, Loon Hsing and Loon Chung" during the years 1977 and 1978. The plaintiffs had incurred disbursements at Penang to the extent of \$258,128.01 which sum remained due and owing to the plaintiffs. **C** In his said affidavit, Mr. Wong also affirmed that he believed that the defendants were at the time when the cause of action arose, the owners of the ship "Loon Sheng" and were also at the date of the issue of the writ in this action the beneficial owners of the "Loon Sheng" in respect of all the shares therein. The grounds for his belief were that it appeared from the register of ships kept by the Surveyor of Ships, Penang for the years 1977 to 1978 that the owners of the said "Loon Sheng" were described as Lord Steamship Company S.A. Room 222 International Building, Hong Kong and that no change of ownership had taken place since the cause of action arose. **D**

E The said vessel "Loon Sheng" was arrested by the Bailiff of the High Court, Penang, on November 27, 1978 and the said writ of summons was also served on the same day. On December 5, 1978, Messrs. Kean Chye and Sivalingam, solicitors for the defendants, entered a conditional appearance for the defendants. As it cost the owners of the said vessel under arrest about \$1,500 per day for wages, victuals, bunkers etc. and there was cargo, including perishable goods aboard it, the said solicitors filed a notice of motion on a certificate of urgency during the court vacation to move the court for the following orders:—

- F** "1. That the Writ of Summons and all subsequent proceedings herein be set aside for want of jurisdiction *in rem* under section 3(4) of the Administration of Justice Act 1956 of England and/or for non compliance with the said section.
- G** 2. Alternatively, that the Warrant of Arrest be set aside on the ground that the affidavit to lead to the Warrant does not establish any right to arrest under the said section 3(4) or at all.
3. That the plaintiffs do pay damages, for the wrongful arrest of the vessel to be assessed by the Senior Assistant Registrar of the Honourable Court or such other person that the Honourable Court may appoint.
- H** 4. That the plaintiffs do pay the defendants' costs of this action and/or of this Motion to be taxed if not agreed.
5. Such further or other relief as this Honourable Court deems fit."

The said notice of motion was heard on December 12, 1978 and at the hearing the main contention of Mr. Mahinder Singh Dulku, who appeared for the defendants, was that there was lack of jurisdiction in this case. He pointed out that the U.K. Administration of Justice Act, 1956 was applicable here in Malaysia by virtue of section 24(b) of the Courts of Judicature Act, 1964 (Revised — 1972), and referred to section 3(4) of the said U.K. Administration of Justice Act, 1956 which is as follows:—

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"In the case of any such claim as is mentioned in paragraphs (d) to (r) of subsection (1) of section one of this Act, being a claim arising in connection with a ship, where the person who would be liable on the claim in an action in personam was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship, the Admiralty jurisdiction of the High Court and (where there is such jurisdiction) the Admiralty jurisdiction of the Liverpool Court of Passage or any county court may (whether the claim gives rise to a maritime lien on the ship or not) be invoked by an action in rem against —

- (a) that ship, if at the time when the action is brought it is beneficially owned as respects all the shares therein by that person; or
- (b) any other ship which, at the time when the action is brought, is beneficially owned as aforesaid."

Counsel contended that the plaintiffs had not complied with the requirement of that subsection of section 3 of the said U.K. Administration of Justice Act, 1956, and referred to the said affidavit of Mr. Wong King Fun wherein it was indicated that Lord Steamship Company, S.A. of Room 222 International Building, Hong Kong were the beneficial owners of the said ship "Loon Sheng" at the time when the writ was issued and would be liable in an action *in personam* when the cause of action arose. It was upon that basis that the Admiralty jurisdiction *in rem* of the court to arrest the said vessel "Loon Sheng" was invoked. The said counsel also pointed out that whilst it was affirmed by one Ong Choon Eng, the Managing Director of the plaintiffs, in an affidavit dated December 14, 1978, that he verily believed that the beneficial owners of the said "Loon Sheng" were Lord Steamship Company S.A., it was, on the other hand, affirmed by the said Mr. Wong King Fun in a corrective affidavit filed on the same day, that is December 14, 1978, that after having made a search he was informed in writing by the Registrar of Ships, Penang on December 2, 1978 that the owners of the said ship "Loon Sheng" were Mensa (Panama) S.A. and not Lord Steamship S.A. as stated in his earlier affidavit.

On the interpretation of the said section 3(4) of the U.K. Administration of Justice Act, 1956, Mr. Mahinder Singh Dalku referred to the following passage in the judgment of Wee Chong Jin C.J. in the Singapore Court of Appeal case of *The "Permina 108"*⁽¹⁾: —

"In our judgment, on the true construction of section 4(4) of the Act, a ship to be liable to arrest must be —

- (a) the ship in connection with which the claim (being a claim under paragraphs (d) to (q) of section 3(1)) made in the action arose, if at the time when the action is brought it is the property of the defendant to the action, the defendant being the person who would be liable on the claim in an action 'in personam' and who was either the owner or charterer of or in possession or in control of, the ship, at the time when the cause of action arose; or
- (b) any other ship which, at the time when the action is brought, is the property of the person liable 'in personam' and who, at the time when the cause of action arose, was either the owner or charterer of, or in possession or in control of, the ship in connection with which the claim arose."

He pointed out that the above-mentioned section 4(4) of the Singapore High Court (Admiralty Jurisdiction) Act (Cap. 6) was *in pari materia* with the said section 3(4) of the U.K. Administration of Justice Act, 1956, which is applicable in this country, and urged the

A court to adopt the same construction for the said section 3(4) of the U.K. Administration of Justice Act, 1956.

Counsel for the plaintiff, Mr. N.T. Vello, referred to section 1(1) of the said U.K. Administration of Justice Act, 1956 regarding Admiralty jurisdiction of the High Court to hear and determine certain questions or claims, and in particular to the two following paragraphs therein: —

- "(m) any claim in respect of goods or materials supplied to a ship for her operation or maintenance.
- (p) any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship."

He contended that even if there was no compliance with the said section 3(4) of the Administration of Justice Act, 1956 the court still had jurisdiction in this case. Counsel said that it was agreed by the parties that the owners of the ship "Loon Sheng" were Mensa (Panama) S.A. and not Lord Steamship S.A., but referred to the case of *The "Aventicum"*⁽²⁾ and contended that the court in all cases could and in this case should look behind the registered owner to determine the true beneficial ownership. He also referred to the said affidavit of Ong Choon Eng dated December 14, 1978 and contended that a bill of lading which was attached to it as an exhibit and marked "OCE 3F" showed that the bill of lading was issued by Lord Steamship S.A. who have held themselves out to be the owners of the "Loon Sheng".

Firstly, I agree that the court could "pierce the corporate veil" and look behind the registered owner to determine the true beneficial ownership of the vessel. But as regards the meaning and scope of the expression "beneficially owned", appearing in the said section 3(4) of the U.K. Administration of Justice Act, 1956, I would refer to the following passage in the judgment of Wee Chong Jin C.J. in the Singapore Court of Appeal case of *The "Pangkalan Susu/Permina 3001"*⁽³⁾: —

"The question is what do the words 'beneficially owned as respects all the shares therein' mean in the context of the Act. These words are not defined in the Act. Apart from authority, we would construe them to refer only to such ownership of a ship as is vested in a person who has the right to sell, dispose of or alienate all the shares in that ship. Our construction would clearly cover the case of a ship owned by a person who, whether he is the legal owner or not, is in any case the equitable owner of all the shares therein. It would not, in our opinion, cover the case of a ship which is in the full possession and control of a person who is not also the equitable owner of all the shares therein. In our opinion, it would be a misuse of language to equate full possession and control of a ship with beneficial ownership as respects all the shares in a ship. The word 'ownership' connotes title, legal or equitable whereas the expression 'possession and control', however full and complete, is not related to title. Although a person with only full possession and control of a ship, such as a demise charterer, has the beneficial use of her, in our opinion he does not have the beneficial ownership as respects all the shares in the ship and the ship is not 'beneficially owned as respects all the shares therein' by him within the meaning of section 4(4)."

With respect I would agree that the expression "beneficially owned as respects all the shares therein" indicates title, legal or equitable, and cannot by any means cover cases of possession and control, however full and complete, without ownership. In this case, however, the copy of the said bill of lading attached to the affidavit of Ong Choon Eng was signed by the

shipper, owner and consignee of the goods covered by the said bill of lading and did not in any way, as contended by counsel, show that Lord Steamship Company S.A. had any title to or ownership of the said ship "Loon Sheng". There was no other evidence adduced on which the court could determine the true beneficial ownership of the ship within the meaning of the said section 3(4) of the U.K. Administration of the Justice Act, 1956.

As regards jurisdiction, I was of the view that section 1 of the U.K. Administration of Justice Act, 1956, which was referred to by counsel for the plaintiffs, merely defines the Admiralty jurisdiction of the High Court. That section, however, must be read in conjunction with section 3 of the said Act which prescribed the mode of exercise of Admiralty jurisdiction, and as regards section 3(4) of the said Act I would, with respect, agree with the views of the Singapore Court of Appeal that for a ship to be liable to arrest it must be the ship in connection with which the claim made in the action arose, if at the time when the action was brought it was the property of the defendant to the action, the defendant being the person who would be liable on the claim in an action *in personam* and who was either the owner or charterer of or in possession or control of the ship at the time when the cause of action arose. Alternatively, a ship liable to arrest could be any other ship which, at the time when the action is brought, is the property of the person liable *in personam* and who, at the time when the cause of action arose, was either the owner or charterer of or in possession or in control of, the ship in connection with which the claim arose.

Applying the above principles to the facts of this case I found, as stated above, that there was no evidence adduced which showed that the true beneficial owners of the "Loon Sheng" were Lord Steamship Company S.A. Indeed, it was not disputed that the said ship "Loon Sheng" was at the relevant times registered in the name of and owned by Mensa (Panama) S.A. As it was Lord Steamship S.A. and not the defendants who would be liable on the plaintiffs' claim in an action *in personam*, it was my judgment that the plaintiffs were not entitled to invoke the Admiralty jurisdiction of the High Court against the "Loon Sheng" which, on the undisputed facts, was not beneficially owned at the date of the issue of the writ by Lord Steamship Company S.A. who were liable *in personam* on this claim. In the result, I allowed the said notice of motion and made an order in terms of prayer I thereof, namely that the said writ of summons and all subsequent proceedings herein be set aside.

As regards damages, it has been held by the Privy Council in the case of *The "Strathnaver"*⁽⁴⁾ that in the absence of proof of *mala fides* or malicious negligence, the court ought not to give damages against the parties arresting a ship. In this case, I found that there was no evidence that the said vessel "Loon Sheng" was arrested by reason of bad faith or gross negligence on the part of the plaintiffs and I, therefore, did not order any damages in favour of the defendants. I also ordered that the costs of the said notice of motion be taxed and paid by the plaintiffs

by the same party for the same cause of action, I also made, in the circumstances of this case, an order that the plaintiffs be at liberty to file fresh proceedings *in rem* and to re-arrest the said ship or vessel "Loon Sheng". (See *Roscoe's Admiralty Practice* (5th Ed.) at page 267).

Order accordingly.

Solicitors: *Kean Chye & Sivalingam; Wong-Chooi & Mohd. Nor.*

RAJA KHAIRULZAMAN SHAH BIN RAJA AZIDDIN & ORS. v. ZAMAN INDAH SDN. BHD.

[O.C.J. (Abdoolcader J.) November 27 and December 19, 1978]
[Ipoh — Civil Suit No. 444 of 1978]

Company Law — Shares — Further call-up on shares — Shares already paid for — Application for immediate entry on register as holders of shares — Whether members/shareholders entitled to — Entry to be made only on completion of allotment — Companies Act, 1965, ss. 54, 56(1)(a) & 107.

The plaintiffs in this case were shareholders and members of the defendant company. Pursuant to the Articles of Association of the company which provided for the issue of shares as and when the need arose, a call-up of shares was made, payment of which was to be made on December 31, 1978. This was the third call for an additional 10 per cent of the shares applied for. The plaintiffs having paid the respective sums on this third call, demanded the issue of share certificates within 48 hours and threatened legal proceedings in default. The share certificates were not issued and the plaintiffs on November 21, 1978 issued a writ and applied by motion for an order for the said shares to be entered into the Register of Shareholders and that the defendants be restrained from convening an Extraordinary General Meeting for December 2, 1978 or any other meetings until the shares have been so registered.

Held, dismissing the plaintiffs' claim: the allotments to all the shareholders on the third call would be made only on or after December 31, 1978 when the allotment of shares on the third call was complete; and no right could accrue before that date for the plaintiffs or any other shareholder for that matter to demand as of right that they be entered on the register of members immediately upon payment in respect of the shares paid for or that they be issued with share certificates forthwith in view of the specific provisions of sections 54 and 107 of the Companies Act.

[Editorial Note: The plaintiffs' appeal to the Federal Court (Notice of Appeal filed on December 11, 1978) was later abandoned.]

Cases referred to:-

- (1) *Lock v. Queensland Investment and Land Mortgage Co.* [1897] 1 Ch. 397, 407; [1896] A.C. 461.
- (2) *Spizel v. Chinese Corporation Ltd.* [1899] 80 L.T. 347.
- (3) *Clarke's Case* (1878) 8 Ch. D. 635.

CIVIL SUIT.

Colin Clark for the plaintiffs.

A.I. Raj for the defendants.

Cur. Adv. Vult.

Abdoolcader J.: The plaintiffs are shareholders in the defendant company and are already on the register of members. When the company was incorporated the directors agreed that the shares would be issued as and when the need arose for additional capital and the allocation of shares was to be made in